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No. 183.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

JAMES P. FINNEGAN, COLLECTOR OF INTERNAL REVENUE, PETITIONER,

v.

DIMMITT-RICKHOFF-BAYER REAL ESTATE COMPANY, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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I.

STATEMENT OF THE CASE.

A. The Facts.

The Statement of Facts as set out by the Petitioner (pp. 2-14) is accurate in the main so no necessity for a lengthy recapitulation from the Respondent's viewpoint

is seen. It is noted with some interest that the Petitioner has taken some 332 lines of his printed petition and brief to set out the facts that the District Court disposed of in 106 lines and the Court of Appeals in 56. Although unnecessarily fulsome in quoting evidentiary details, no quarrel is found with the Statement except where it strays from the factual situation pertaining to ownership of commissions paid on sales made. For example (p. 5), it is stated, "The salesmen were paid on a commission basis . . ." and (p. 8) "For procuring a listing a salesman received a stated percentage of the company's gross percentage," etc. All the evidence showed that, when a sale was made of a listed property, the commission (fixed by a schedule adopted by the St. Louis Real Estate Exchange [p. 10]) was common property of the interested parties—the company, the salesman securing the listing, the salesman making the sale, mayhap a salesman associated with another company—split the melon. The percentage to which each was entitled was set out in the contract between the company and the salesman (Sup. R. 13). In short, the company "paid" the salesman not at all. He received his share of the fruits of his labor in a joint enterprise. There are a number of similar minor deviations not mentioned here as the concise factual situation is not felt to be too important in the present matter.

B. The Question Presented.

No quarrel is found with the Petitioner's statement of the Question Presented (p. 2). It would have been perhaps more accurately stated as, "Are real estate salesmen associated with respondent its employees within the meaning of the provisions of the Federal Unemployment Tax Act contained in Section 1607 (b), (c) and (i) of the Internal Revenue Code so as to make respondent liable for taxes on commissions collected by said salesmen?"

C. **Rulings of the Courts Below.**

The District Judge filed no written opinion, but set out to a limited extent his reasoning in a letter to the United States District Attorney (R. 114). He held the company retained the right to direct and control the means and methods of work by salesmen to the extent established by Treasury Regulations and required by common law, and hence they were employees. Judgment was entered for defendant.

Upon appeal the Court of Appeals for the Eighth Circuit reversed the judgment of the District Court and remanded the case with directions to enter judgment for the plaintiff. This decision was based upon an analysis of the decision of the Supreme Court in United States v. Silk and Harrison v. Greyvan Lines, Inc., 331 U. S. 704, 91 L. Ed. 1757, 67 S. Ct. 1463, a decision of the Missouri Supreme Court in A. J. Meyer & Co. v. Unemployment Compensation Commission of Missouri, 348 Mo. 147, 152 S. W. 2nd 184, and the intent of Congress as shown by the congressional debate on the question particularly in the Reports of the Congressional Committee accompanying the Joint Resolution (U. S. Code, Congressional Service, Vol. 2, 80th Congress, Second Session, 1948, page 1752 et seq.). The Court concluded the salesmen were not employees within the meaning of § 1607 (i) of the Internal Revenue Code, as amended.

II.

ARGUMENT.

Petitioner asks that this Court issue its writ of certiorari to review the judgment of the Court of Appeals for the Eighth Circuit entered in this case on two grounds: (1) That the salesmen were employees under the common-law test "realistically applied"; and (2) That the question involved is an important one to the administrative agencies involved in the coverage of the Unemployment Tax Act.

Respondent contends that no basis exists for granting the petition and urges a denial of the petition for the reasons set out below.

The Supreme Court rules enunciate clearly the basis on which a writ of certiorari will be granted. Reasons for granting a writ which patently do not exist such as presence or absence of an international question are not here discussed. Reasons for granting the writ present by implication will be examined only briefly.

A. There Is No Conflict in Decisions.

The petition for certiorari in this case does not directly assert as a reason for granting a writ a conflict in decisions. However, in the first reason advanced, the petitioner by implication does suggest a possible conflict in decisions when it states (p. 17): "Indeed the control here possessed by the Company is no less than that of the Singer Company over its traveling salesmen in Singer Manufacturing Company v. Rahn, supra." Petitioner also states (p. 18) that the decision of the Eighth Circuit is not supported by the decisions of this court in United States v. Silk and Harrison v. Greyvan Lines, supra. It is admitted that the decision of the Court of Appeals of

the Eighth Circuit in Henry Broderick, Inc., v. Squire, 163 Fed. 2nd 980, "lends some support to the results below." Then it states that to the extent that the Broderick case supports the result below in this case (p. 19) the Broderick decision seems inconsistent in principle with the decisions in two district court cases there cited. Then, evidently for the purpose of raising a question of a possible conflict in cases, the petitioner cites National Labor Relations Board v. Phoenix Mutual Life Insurance Co., 167 Fed. 2nd 983. Of course the question involved in that case is the definition of employer-employee relationship under the National Labor Relations Act, 49 Stat. 449, Section 1 et seq. [29 U. S. C. A., Section 151 et seq.].

Petitioner's half-hearted attempts to suggest a conflict in decisions may be disregarded. Even a superficial reading of the decision of the court below shows that in principle the Eighth Circuit followed the test laid down in the Silk and Greyvan cases, which tests were approved by Congress in the Congressional debate on amendments to the Act. Senate Report No. 1255, supra, says, "The decisions of the Court in Silk and Greyvan Lines and Bartels, and the test, the moving principles by which the Supreme Court reached those decisions, were the usual common-law tests and principles realistically applied" (U. S. C. Cong. Serv., 1948, Vol. II, p. 1766). The Broderick case is squarely in point, and the same tests were applied. In addition thereto, petitioner overlooked a number of other decisions involving the same principles although concerned with businesses other than the real estate business. E. g., see Party Cab Co. v. United States, 172 Fed. 2nd 87; New Deal Cab Co. v. Fahs, 174 Fed. 2nd 318; Economy Cab Co. v. Fahs, 174 Fed. 2nd 321; Grace v. McGruder, 148 Fed. 2nd 679, inter alios.

B. **No Important New Question Is Raised.**

Part two of rule 38 of this Court provides, "Where a Circuit Court of Appeals . . . has decided an important question of Federal Law which has not been, but should be, settled by this court," that certiorari may be granted. There is no controversy in this case with respect to legal principles. The same principles that were applied by the Eighth Circuit in the instant case were applied by the Supreme Court in the Silk and Greyvan cases. In granting certiorari in 1946 in those two cases the Supreme Court stated, "Writs of certiorari were granted, . . ., because of the general importance in the collection of social security taxes of deciding what are the applicable standards for the determination of employees under the Act." United States v. Silk and Harrison v. Greyvan, supra (331 U. S., l. c. 705).

Congress has by the Social Security Amendment of June 14, 1948, reiterated their intent that "the usual common-law rules, realistically applied, shall continue to be used to determine whether a person is an 'employee' for the purpose of applying the Social Security Act," Senate Report No. 1255, 80th Cong., 2nd Sess., U. S. C. Cong. Service, p. 1752 et seq. The Appellate Court in the instant case even adopted in toto the test set out in the case relied on most heavily by the petitioner as well settling the test to be applied. In its decision it sets out, "The usual common-law rules for determining the existence of the relationship of employer and employee was concisely stated by the Supreme Court of the United States in Singer Manufacturing Co. v. Rahn, 132 U. S. 518, 523, as follows:" and then the Eighth Circuit proceeded to set out exactly the language quoted from that case on pages 14 and 15 of the Petitioner's Brief. See Dimmitt, Rickhoff, Bayer v. Finnegan, Collector, 179 Fed. 2nd, l. c. 883-4.

Of course the petitioner has not claimed in his petition that an important new question of law is involved, but the implication under the second reason advanced by the petitioner for granting the writ is clear. The gravamen of the argument advanced as the second reason for granting the writ is that the decision will have an impact extending far beyond the real estate field. This is not per se a claim advanced by the petitioner that an important new question of law is raised, but the inference is plain. It is also plain from an examination of the facts that the inference is unwarranted.

C. **Petitioner Merely Seeks a Review of the Evidence and a Rehearing.**

The petitioner under his first reason for granting the writ sets out in some detail a summary of the facts in the instant case (pp. 15, 16, 17). The facts had already been set out under his "Statement of the Case" in lengthy detail occupying some eleven pages of the petition. It is then argued, "We think it is clear that these facts satisfy the control test of the common-law as reflected in the Treasury Regulations" (p. 17).

The quarrel petitioner has with the Eighth Circuit decision in the instant case is not that the wrong tests were applied, but that the tests were wrongly applied. This is the error for which petitioner seeks redress. There exists a shadowland in business relationships that cannot be clearly illuminated as a whole by any court decision. Cases involving the legal effect of these relationships in relation to the Federal Unemployment Tax Act in our complex economical structure necessarily differ in their facts. The decision of a particular case must rest upon the particular facts shown in evidence to exist in that case. Given the facts in this case, the court below found the salesmen herein are not employees.

If certiorari should be granted, this court could not resolve any conflict in decisions because there is no conflict in the application of the tests applied in this case or in any other case. The conflict found by the petitioner arises from difference in states of fact. Certiorari here will not serve to decide any important principle of law. The correct principles of law were applied by the court below, and those same principles of law in view of the present wording of the law and the expressed Congressional intent must be applied to every other case arising under the Act for determination of whether the employer-employee relationship exists.

But the petitioner asks certiorari because "It is important to the administrative agencies involved that the court grant this petition" (p. 21). What the petitioner really wants is this court to pronounce that 150,000 real estate salesmen, 19,000 security salesmen, over 100,000 wholesale and manufacturing salesmen, 96,000 industrial insurance salesmen, and approximately 6,000 life insurance salesmen mentioned on page 21 of his brief are employees within the meaning of the Act. The petitioner fears that "a whittling away of coverage for social security purposes which, if the decision below stands, will reach alarming proportions" (p. 21).

This is entirely outside of the scope of any writ of certiorari based on the question presented to this court.

It is the desire of the petitioner, as this respondent reads the petition, that this court determine the effect of differences in factual details. In effect the petitioner urges certiorari so that this court may place a value—a significance—an appraisal upon each factual detail and each shade of reltionship involved whenever two men associate themselves for the purpose of doing business. The decision of the court in a case such as this is dependent upon a varied and multitudinous set of facts. If this court

should undertake the monumental mission of weighing, evaluating and classifying each fact involved in this case, and should determine a mathematical formula to be placed upon the importance, significance and relevancy of each of these facts so as to furnish a rigid rule for the application of the common-law test, the result strained for by the petitioner would still not be attained. The next case that arose for determination would present an entirely different set of facts, both in number and in combination. The petitioner then would stand before the bar of this Court and again ask certiorari so that this Court would again, perforce, sift, evaluate and tag the facts in that case. The spillways would be open so that this Court would be drowned in a flood of cases each demanding that the court review the facts and the evidence already determined by Appellate Court below.

There can be no doubt that the petitioner seeks a review largely because of what it regards as an error in the application of the common-law test by the court below. Supreme Court rule 38, supra, was never intended to provide for the issuance of a writ of certiorari because of a contention by a petitioner that the court below reached an erroneous result on the facts presented to it.

Certiorari is not granted by the Supreme Court in cases where the court below has afforded the petitioner a full hearing and where certiorari is sought for the purpose of re-examining the correctness of the results. Deputy v. duPont, 308 U. S. 488, 84 L. Ed. 416 (dissent). Certiorari is not granted merely to review the evidence, discuss specific facts or to pass upon inferences drawn from the evidence or facts. General Talking Pictures Corp. v. Western Electric Company, 304 U. S. 175, 82 L. Ed. 1273; United States v. Johnston, 268 U. S. 220; Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508, 68 L. Ed. 413, Mr. Justice Holmes stated in United States of

America v. Johnston, supra, "We do not grant a certiorari to review evidence and discuss specific facts." See also Magnum Import Co. v. Coty, 262 U. S. 159, 163, 48 S. Ct. 531, 532, 67 L. Ed. 922, where the court stated, "The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing."

When the petition in the instant case is analyzed, it becomes obvious that what the petitioner seeks is a review of the evidence—a re-examination of the facts—a rehearing. The petitioner does not challenge the principles of law involved—he simply does not like the decision.

D. **The Proper Tests Were Applied in the Instant Case.**

An analysis of the opinion of the Eighth Circuit in the instant case is informative. It clearly shows that the tests and regulations followed by the Eighth Circuit were exactly the same as those urged by the petitioner.

Follow the Court's opinion. We find the Court starts off: "(1) The usual common-law rules for determining the existence of relationship of employer and employee was concisely stated by the Supreme Court of the United States in Singer Manufacturing Co. v. Rahn, . . .", Dimmitt, Rickhoff, Bayer v. Finnegan, 179 Fed. 2nd 883, 884. This is the exact statement of the proper test as set down under petitioner's first reason for granting the writ (p. 13). In the next paragraph the court continues as follows: "The applicable Treasury Regulations, which are on elaboration of the rule (Radio City Music Hall Corp. v. United States, 2 Cir., 135 Fed. 2nd 715, 717-718) are set out in the margin." The case then sets out exactly the same excerpt from Treasury Regulation No. 107 on page 884, supra, as the petitioner sets out on pages 25, 26, 27 in the Appendix to his petition. On page 885 of 179 Fed. 2nd, the court continues, "The question, as we see

it, is whether the plaintiff, in its contractual arrangement with its salesmen, retained the right to control the manner in which they did business."

Petitioner, after recounting his concept of the facts, arrives at the conclusion, "We think it clear that these facts satisfy the control test of the common law as reflected in the Treasury Regulation" (p. 17). The Eighth Circuit in its opinion stated that the Supreme Court of Missouri held "under the usual tests for determining the employer-employee relationship, salesmen such as those here involved are not the employees of their principal, but are independent contractors. A. J. Meyer v. Unemployment Compensation Commission of Missouri, 348 Mo. 147, 152 S. W. 2nd 184;" that "The Circuit Court of Appeals of the Ninth Circuit, in the case of Henry Broderick, Inc., v. Squire, 163 Fed. 2nd 980, reached the same conclusion with respect to real estate brokers whose relation to their principal, we think, differed in no controlling respect from the relation of the salesmen in the instant case to the plaintiff." The court continues on the same page (887), "An analysis of the opinion of the Supreme Court in the cases of U. S. v. Silk and Harrison v. Greyvan Lines, Inc., 331 U. S. 704, 67 S. Ct. 1463, 91 L. Ed. 1757, indicates to our minds that a ruling that the plaintiff in the instant case, under its arrangement with its salesmen, had retained the right to control the manner in which they were to accomplish results, is not justified by the evidence. We think that the Greyvan Lines, Inc., as shown by the opinion of the Supreme Court, had and exercised far more control over the manner in which its truck operators, who were held to be independent contractors, did business than the plaintiff in the instant case had over the activities of its salesmen in soliciting listings and finding purchasers." The court then examines the intent of Congress as shown by its amendment to section 1607 (i) of the Internal Revenue Code (p. 888 of the opinion), which amendment is

set out in the Appendix to the petitioner's brief on pages 24-25. The court then concluded that under these tests, which are exactly the same tests advocated by the petitioner here as the proper test to be used, the salesmen in the instant case were not employees within the meaning of the act. The tests followed by the court were the ones urged as the correct test by the petitioner. The tests followed by the court were the proper tests.

E. **The Supreme Court Has Refused Certiorari Under Similar Circumstances.**

The Government sought certiorari in three recent cases involving the question contained in the instant case. These were cases in which a company sought to recover taxes collected under the Federal Unemployment Tax Act. They were Party Cab Co. v. United States, 172 Fed. 2nd 87; Economy Cab Co. v. Fahs, 174 Fed. 2nd 321, and New Deal Cab Co. v. Fahs, 174 Fed. 2nd 318. In all three of those cases certiorari was denied (338 U. S. 818).

While no reason was given by this Court in denying certiorari, an examination of the petitions in the three cases is of some interest. They are docketed as case Nos. 869-870-871 in the October term, 1948. The Government advanced as its reasons for granting certiorari in the New Deal Cab Co. case that it was a companion case to the Economy Cab Co. case, hence, if certiorari was granted in the Economy case, it should likewise be granted in the New Deal Cab Co. case. The Economy Cab Co. case was based on an alleged conflict between the decision of the court in the Fifth Circuit and the case of Jones v. Goodson, 121 Fed. 2nd 176, in the Tenth Circuit. Tossed in as additional argument was the statement that it and the Party Cab Co. case effected the rulings of the Bureau of Internal Revenue as to status of 136,000 cab drivers. It even found a conflict between the decision of the court in

the Fifth Circuit in the Economy Cab Co. case and the court in the Seventh Circuit in the Party Cab Co. case, supra, although both of those cases were decided in favor of the company and the same common-law tests were applied.

In the Party Cab Co. case the argument was advanced that, if the court granted certiorari in the Economy and New Deal Cab Co. cases, it should also grant certiorari in the Party Cab Co. The same status of the same 136,000 cab drivers was again viewed with alarm by the Bureau of Internal Revenue in the Party Cab Co. case. Any factual distinction between the holdings of the court in the various cases was brushed aside by the simple statement, "the basic plan is the same" (p. 7, Petition for Writ in United States v. Party Cab, No. 871, October term, 1948, Supreme Court of the United States). To bolster the petition an excerpt from the opinion of the Court of Appeals from the Seventh Circuit in Party Cab Co. case was included therein. This statement of the court was to the effect: "That we are presented with a perplexing problem is evident from the opposing results which have been reached and the contrariety of views expressed in a number of cases." Party Cab Co. v. United States, 172 Fed. 2nd, l. c. 88.

The petitioner in the Party Cab Co. case did not go on to the rest of the court's opinion which makes its argument of "a perplexing problem" sterile. We refer to that part of the opinion which continues as follows: "A study of the cases where the question has been considered discloses that varying facts account in no small measure for the contrary results which have been reached. Another factor which has played a large part is the policy pursued by the Social Security Board and courts in the **broadening** of the concept of the term 'employee' and **the consequent inclusion within the coverage of the Act** of a number of

persons who are not in ordinary usage looked upon as employees. Prior to a consideration of the facts in the instant matter, we regard it as important to note this policy of the Board and the courts which was resented by Congress and which in 1948 culminated in certain amendments to the Act expressly designed to restrict its coverage." Party Cab Co., supra, l. c. 88-89.

Grace v. McGruder, 148 Fed. 2nd 679, certiorari denied 326 U. S. 720, presented the same problem from the opposite approach. Here the employer was denied recovery by the United States Court of Appeals for the District of Columbia, and sought certiorari on the grounds that a conflict of laws was presented by the various decisions and that a question of importance was presented. In all four of those cases certiorari was denied. A stronger argument was presented in any one of the four for the issuance of a writ than in the instant case. The brief for the government in opposition to the granting of the writ in Grace v. McGruder admitted a conflict between the decision in that case and the decision in U. S. v. Vogue, 149 Fed. 2nd 609. It continued that the Supreme Court had already denied a rehearing in Glen v. Beard, 141 Fed. 2nd 376, certiorari denied 323 U. S. 724, although there was a conflict between the Vogue case and the Beard case. It concluded, "In these circumstances, and believing the decision below to be correct, we submit that the petition herein should likewise be denied" (p. 6, Brief for Respondent in Opposition to a Writ of Certiorari in Grace v. McGruder, No. 102, October term, 1945, in the Supreme Court of the U. S.). The Supreme Court has denied certiorari unfailingly in similar cases.

A reliable yardstick for measurement of the coverage under the act has been set down by the Supreme Court in the Silk and Greyvan Lines cases. That yardstick has had the approval of the Congress. A defeated party-

litigant always contends that the court applied the wrong principles of law or applied the correct principles of law in the wrong manner. The correct principles of law were followed. It is not the function of a Writ of Certiorari to determine whether the correct principles of law were wrongly applied.

III.

CONCLUSION.

It is clear that the United States Court of Appeals for the Eighth Circuit applied the proper tests in reaching the decision in the instant case. Although implied, there is no conflict in decisions. Although implied, no important principle of law is presented for determination. The review of this case by this Court cannot possibly furnish a guide for the decision of other cases which must be decided on the factual situation presented by such other cases. Certiorari is not and should not be granted to review the evidence and to grant a rehearing. Certiorari has been refused by this Court in similar cases involving the identical question here presented.

It is sincerely urged that the petition for the writ of certiorari should be denied.

Respectfully submitted,

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